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No. 88-1824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT F. DEFORD, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION,

Petitioners,

v.

SOO LINE RAILROAD COMPANY, et al.,

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Does Section 3 First of the Railway Labor Act, 45 U.S.C. § 153 (1982), or the Interstate Commerce Act's regulation of rail asset acquisitions and the regulations promulgated thereunder, 49 U.S.C. §§ 10505, 10901 (1982); 49 C.F.R. §§ 1150.31-1150.34 (1986), completely preempt an action brought in state court seeking to rescind a sale of rail assets through the procedural mechanism of state fraudulent conveyance law where the Interstate Commerce Commission has fully examined and approved the sale and where the action seeks to assert claims arising out of and requiring construction of railway labor agreements presenting a minor dispute subject to the exclusive jurisdiction of the National Railroad Adjustment Board?

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No. 88-1824

ROBERT F. DEFORD, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION,

Petitioners,

v.

SOO LINE RAILROAD COMPANY, et al.,

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Soo Line Railroad Company (hereinafter "Soo Line") and Wisconsin Central Ltd. (hereinafter "Wisconsin Central")[1] respectfully request this Court to deny the petition for writ of certiorari filed by petitioners Robert F. Deford, Railway Labor Executives' Association (hereinafter "RLEA") and United Transportation Union[2] seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. In the interest of brevity, respondents submit this joint brief in opposition to the petition.

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[1] In addition to Soo Line and Wisconsin Central, individual respondents are Dennis Cavanaugh, Edward A. Burkhardt, Thomas F. Power, and Robert H. Wheeler. The individual respondents join in and adopt the arguments set forth herein.

[2] Although the President of the United Transportation Union was a member of the RLEA at the time suit was filed, the United Transportation Union was not a party to the proceedings below and, therefore, is not a proper party petitioner in this Court. *See* 28 U.S.C. § 1254 (1982) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case. . . .").

STATEMENT OF THE CASE

Soo Line is a Class I rail carrier subject to the jurisdiction of the Interstate Commerce Commission (hereinafter "ICC") under the Interstate Commerce Act (ICA), 49 U.S.C. §§ 10101-11917, and is a "carrier" as that term is defined in Railway Labor Act (RLA), 45 U.S.C. § 151 First. On April 2, 1987, Soo Line agreed to sell approximately 1,960 miles of its 7,750 miles of rail lines to Wisconsin Central. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1082 (8th Cir. 1989). Wisconsin Central is an Illinois Corporation which was not a carrier until consummation of its purchase of the rail lines. Since the purchase, Soo Line and Wisconsin Central have been and continue to be completely independent and self-sufficient railroads.

1. Proceedings Before the Interstate Commerce Commission

The asset purchase agreement between Soo Line and Wisconsin Central was a cash transaction subject to financing and other customary conditions. Specifically, the transaction was subject to the ICC's regulatory approval pursuant to 49 U.S.C. § 10901, or exemption from approval pursuant to 49 U.S.C. § 10505 and the class exemption regulations promulgated thereunder by the ICC. *See* 49 C.F.R. §§ 1150.31-1150.34 (1986) (adopted by *Ex Parte 392, (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (1986) (hereinafter "*Ex Parte 392*")), *review denied sub. nom. Illinois Commerce Comm'n v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Accordingly, on September 4, 1987, Wisconsin Central filed with the ICC a verified notice of class exemption announcing

its intention to acquire from Soo Line and to operate certain rail lines. No objections to the notice were filed. On September 10, 1987, however, the ICC sua sponte issued a decision staying the effective date of the notice and soliciting comments on the proposed transaction.[3]

On September 25, 1987, the RLEA filed comments with the ICC and requested an investigation and hearings concerning the proposed transaction. The RLEA specifically challenged the proposed transaction on the ground it would increase the risk that the ongoing operations of both Soo Line and Wisconsin Central would be threatened due to the leveraged nature of the proposed transaction. *See* Comments and Request for an Investigation and Oral Hearings of the Railway Labor Executives' Association at 6-9 (September 25, 1987). The RLEA filed detailed comments in support of its position, including the Declaration of Brian M. Freeman, a financial advisor to the RLEA, analyzing the financial strength of the transaction. Freeman specifically addressed the leverage issue and the supposed effect it would have upon Soo Line employees.[4] Joint Appendix in 8th Cir. No. 87-5376 (hereinafter "J.A.") 103-130.

On October 8, 1987, after evaluating the comments of the RLEA and others,[5] the ICC issued a decision lifting the stay.

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[3] On September 11, 1987, Wisconsin Central and Soo Line filed petitions for reconsideration of the stay. On September 18, 1987, the ICC denied the petitions.

[4] Inconsistent with its alleged concerns over the leveraged nature of the transaction, RLEA members, through Mr. Freeman, sought to purchase the same rail lines that Wisconsin Central purchased. Only after the bid was rejected did the RLEA raise the instant objections. *See* J.A. at 11-13 (referring to the RLEA proposal made by Freeman).

[5] The Brotherhood of Locomotive Engineers and petitioner United Transportation Union also filed notices of opposition with the ICC.

Wisconsin Cent. Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line R.R. Co., Finance Docket No. 31102 at 2 (October 7, 1987) (reprinted as Appendix B hereto at A-41-A-46). In its decision, the ICC specifically noted that the RLEA and others had expressed concerns about the proposed transaction, but found that the concerns "may be adequately addressed in the context of petitions to revoke the exemption, the usual procedure for resolving issues raised in class exemption proceedings." *Id.* at A-44. Thus, the ICC indicated it would retain jurisdiction to scrutinize the transaction and would entertain petitions to revoke the exemption.

On October 11, 1987, Soo Line and Wisconsin Central completed the transaction. On December 29, 1987, the RLEA filed with the ICC a petition for revocation of the exemption. In its petition, the RLEA again challenged the financial aspects of the transaction and its impact on the rights of employees under railway labor agreements. *See* Railway Labor Executives' Association's Petition for Revocation of the Exemption, Petition for Discovery and Request for Oral Hearing, Finance Docket No. 31102 (December 30, 1987). On July 8, 1988, the ICC issued a lengthy opinion and order refusing the revoke the exemption. *Wisconsin Cent. Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line R.R. Co.*, Finance Docket No. 31102 (July 8, 1988) (hereinafter "Revocation Decision") (set forth herein as Appendix A at A-1 - A-40).

Specifically, the ICC analyzed in detail the financial aspects of the transaction and concluded Wisconsin Central's financial position was stable. The decision stated:

> We have employed and disclosed confidential information submitted by the petitioners in conducting our analysis, discussed herein, as to whether the terms of the sales

> agreement of the trackage rights agreement or any other aspect of this transaction appear to create a carrier which will be so financially weak as to be unable to provide adequate transportation service to the public. On the basis of that analysis, we have declined to grant RLEA's petition for revocation.

Id. at A-27.

2. The Instant Action

On June 12, 1987, petitioner Deford and petitioner RLEA filed the instant action in Minnesota state district court. Petitioners' complaint alleged claims under the Minnesota Fraudulent Conveyances Act, Minn. Stat. §§ 513.20-513.32 (1986) (recodified as amended at Minn. Stat. §§ 513.41-513.51 (1988)). In essence, the complaint alleged three theories of recovery. First, it alleged the sale of Soo Line assets to Wisconsin Central violated the fraudulent conveyances act because the proceeds of the sale would be distributed to Soo Line shareholders leaving Soo Line with an unreasonably small amount of capital for future operations, thereby impairing the rights of Soo Line employees and the RLEA as creditors of Soo Line. *See* J.A. at 8-35. Second, it alleged the transaction would be fraudulent as to Soo Line employees who would subsequently work for Wisconsin Central because Wisconsin Central's secured lenders, who presumably loaned funds to finance the acquisition, would have superior claims to Wisconsin Central's assets. *Id.* Third, it alleged the transaction was intended to circumvent contractual obligations with employees and unions and thus, Wisconsin Central and Soo Line tortiously interfered with creditors' rights and conspired to frustrate creditors' rights. *Id.*

Concerning Petitioners' claims as creditors, the complaint stated:

> Claims of Deford and the Class [of similarly situated Soo Line employees] include, but are not limited to, the following: accrued but unpaid labor protection pay; accrued but unpaid life, health, and/or accident insurance premiums, accrued but unpaid pension plan contributions; and contingent claims with respect to each of the foregoing which could reasonably be expected to arise out of the transaction at issue here. RLEA claims include various "check-off" items for which Soo Line is directly indebted to RLEA.

J.A. at 25.

On July 1, 1987, respondents filed a petition for removal to the United States District Court for the District of Minnesota. J.A. at 43-48. Thereafter, petitioners moved to remand the matter to state court and respondents moved to dismiss for failure to state a claim upon which relief may be granted. J.A. 53-58, 59-61. On August 21, 1987, the district court denied Petitioners' motion and granted Respondents' motion to dismiss. *See* Petition for Writ of Certiorari, Appendix D.

In so ruling, the Court stated:

> The basic injury asserted in this case arises from the employment relationship between the Plaintiffs and the Defendant railroad. The existence and extent of any rights Plaintiffs may have are dependent upon the interpretation then of their Railway Labor Agreement. The interpretation of a contract of employment with a railroad is exclusively under the [RLA] and involves a minor dispute according to that statute.

Petition for Writ of Certiorari, Appendix B at 32a. Thus, the district court found removal proper because Section 3 First of the RLA completely preempted petitioners' state law claims. Thereafter, the district court dismissed the action on the ground that petitioners' claims presented a minor dispute subject to the exclusive jurisdiction of the National Railroad Adjustment Board. *Id.* at 33a-34a.[6]

On appeal, the Eighth Circuit agreed with the district court that Section 3 First of the RLA completely preempts petitioners' state law fraudulent conveyance claims. The Court specifically found that, "[t]he existence and extent of the creditor's rights asserted by Deford and the RLEA . . . can be determined only by interpreting the collective bargaining agreements." *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1086 (8th Cir. 1989). In addition, the Court noted that in a separate action in Illinois federal district court the RLEA alleged that the proposed transaction would affect the rates of pay, rules and working conditions set forth under various collective bargaining agreements and sought an order requiring the carrier to comply with the terms of the RLA and to engage in mandatory arbitration. *Id.* at 1087.

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[6] The district court did not reach the question whether the ICA also preempted petitioners' state law claims. It stated:

> The argument has obviously much focused on the Interstate Commerce Act and its preemptive aspect, that is because the parties appear to have tacitly agreed that this dispute goes to the validity of and the viability of the sale of a portion of the Soo Line to Wisconsin Central, Limited. That may well be the prime dispute but the Minnesota cause of action and that before this Court concerns rights arising under the present existing Labor Act and the Plaintiff's perception that its rights are in jeopardy. This focus leads the court to conclude that the Railway Labor Act provides a proper analytic mode.

Petition for Writ of Certiorari, Appendix B at 31a.

Based on these findings the Court stated:

> In this case the creditors rights asserted are based upon the terms of the collective bargaining agreements and the Minnesota Statute only provides an additional method for enforcing the terms of the agreements. We therefore affirm the district court's finding that Deford's claims directly involve the collective bargaining agreements and constitute "minor disputes" under the RLA.

Id.

The Eighth Circuit also found that the provisions of the ICA governing the sale of rail assets and the regulations promulgated thereunder completely preempt petitioners state law claims. In so finding, the Court first noted the broad authority Congress granted the ICC to govern railway transactions, including the specific authority to exempt acquisitions from the approval process set forth in 49 U.S.C. § 10901. *Deford*, 867 F.2d at 1088. Moreover, the Court noted that petitioners submitted extensive comments to the ICC both before the ICC lifted its stay of the effective date of the class exemption and in a petition to revoke the exemption. Petitioners' comments argued the financial aspects of the transaction and urged the ICC to deny the exemption or to impose labor protective conditions. *Id.* at 1090. The Court noted that "after a detailed analysis, the ICC concluded Wisconsin Central's financial position was stable and that it would not revoke the exemption nor impose employee protective conditions." *Id.*

Based on the broad authority the ICC exercises over rail line transfers and petitioners' extensive participation in the ICC exemption review process, the Eighth Circuit concluded:

> RLEA's present attack on this transaction is no more than an attempt to annul or set aside the ICC's decisions

> with respect to this rail transaction under the exemption procedures. We therefore find it impossible to grant the relief Deford and the RLEA seek here without impinging on the ICC's order. We conclude that when such a collateral attack is brought in state court under the guise of state law, the ICA necessarily completely preempts the state law claims and the suit is removable to federal court.
>
> . . . .
>
> In sum, we believe that the ICA demonstrates Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

Id. at 1090-91.[7]

Thus, the Court of Appeals found both Section 3 First of the RLA as well as the provisions of the ICA governing the sale of rail assets completely preempted petitioners' state law

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[7] Dissenting from the Eighth Circuit's opinion, Chief Judge Lay believed neither the RLA nor the ICA justified removal under the complete preemption doctrine. *Deford*, 867 F.2d at 1091. With respect to the RLA, the dissent opined that because state law, in this case the Fraudulent Conveyances Act, creates an entitlement independent of the collective bargaining agreement, no interpretation of that agreement was necessary and therefore the state law action was not preempted. *Id.* at 1092. Concerning the ICA, the dissent argued that neither the ICC's broad grant of jurisdiction found in 49 U.S.C. § 10102(26) nor other specific grants of jurisdiction found in the ICA is sufficiently pervasive in scope to justify complete preemption. *Id.*, 867 F.2d at 1092-93. In addition, the dissent based its conclusion on its belief that the ICC did not reach the merits of the claims that would have been raised in the fraudulent conveyance action. *Id.* at 1093.

claims and formed an appropriate basis for removal. Having found the district court properly entertained removal jurisdiction, the Court of Appeals affirmed the district court's dismissal of the action.

REASONS FOR DENYING THE WRIT

This Court has recently set forth in detail the jurisdictional framework governing removal of federal question cases stating:

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.

Caterpillar Inc. v. Williams, 482 U.S. 386, ——, 107 S.Ct. 2425, 2430 (1987) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936) (footnotes omitted); *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, ——, 107 S.Ct. 1542, 1546 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12-13 (1983).

Under the "well-pleaded complaint rule," however, a plaintiff may not defeat federal jurisdiction by deliberately excluding a federal claim from its complaint if relevant federal law so pervasively occupies or regulates a field that a competing state law claim necessarily invokes federal law. *See Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. at 1246. In such a case the plaintiff's claims are "necessarily federal in character" and the preempting statute "converts an ordinary state

common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.*, 107 S. Ct. at 1547; *see also Caterpillar Inc. v. Williams*, 107 S. Ct. at 2430 ("Once an area of state law has been completely preempted, any claim purportedly based on the preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

Applying the complete preemption doctrine, this Court has held that the proper inquiry is whether Congress intended to displace a state cause of action. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) ("the question whether a certain state action is preempted by federal law is one of congressional intent"). Moreover, this Court has recognized such an intent where interests in uniformity in implementing national policy require uniform federal interpretation. *See Metropolitan Life Ins. Co.*, 107 S.Ct. at 1547; *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 1044, ——, 107 S.Ct. 2161, 2166 (1987).

I. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THE COMPLETE PREEMPTION DOCTRINE AS SET FORTH IN THE DECISIONS OF THIS COURT.

Applying the principles set forth in this Court's opinions, the Eighth Circuit examined whether Congress intended to displace petitioners' state law claims through Section 3 First of the RLA or the provisions of the ICA relating to the acquisition of rail assets. In properly finding petitioners' claims under the Minnesota Fraudulent Conveyances Act completely preempted, the Eighth Circuit established no new law. Rather, the Eighth Circuit ruled in a manner that is entirely consistent with the complete preemption principles clearly set forth by this Court.

A. The Railway Labor Act

Congress enacted the RLA to promote stability in labor-management relations in the railroad industry. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). In furtherance of this policy, Section 3 First of the RLA provides for a mandatory and exclusive administrative grievance procedure to resolve so-called "minor disputes" arising out of collective bargaining agreements subject to the RLA.[8] *See* 45 U.S.C. § 153 (1)(i) (1982). Pursuant to the administrative procedure, the RLA grants the National Railroad Adjustment Board (NRAB) exclusive jurisdiction to resolve such minor disputes. *Id.* "A party who has litigated an issue before the [NRAB] on the merits may not relitigate that issue in an independent judicial proceeding." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972).

Recognizing the national transportation policy Congress set forth in the RLA and the stability in labor relations Congress sought to promote by placing responsibility for interpreting collective bargaining agreements solely within the NRAB, the Eighth Circuit held that "it was Congress' intent that the RLA govern all railway labor disputes such as those in this case arising from collective bargaining agreements." *Deford*, 867 F.2d at 1086. In so holding, the Eighth Circuit noted the overwhelming case law supporting the preemptive force of the RLA. *Id.* at 1085 (citing *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 321 (1972); *Schroder v. Trans World Airlines Inc.*, 702 F.2d 189, 192 (9th Cir. 1983); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th

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[8] Minor disputes involve interpretation or application of an existing collective bargaining agreement. *See, e.g., Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945).

Cir. 1983); *McKinney v. International Association of Machinists & Aerospace Workers, District Lodge No. 1450*, 624 F.2d 745, 747 (6th Cir. 1980)).

In addition, the Eighth Circuit cited with approval case law holding that this Court's conclusion in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)—that Section 301 of the Labor Management Relations Act (LMRA) completely preempts state law—requires a finding that Section 3 First of the RLA also completely preempts state law because the two sections serve essentially the same function. *Deford*, 867 F.2d at 1085-86 (citing *Leu v. Norfolk & W. Ry. Co.*, 820 F.2d 825, 839 (7th Cir. 1987); *Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986)). Thus, the Eighth Circuit found that "the complete preemption doctrine applies to collective bargaining disputes under the RLA." *Deford*, 867 F.2d at 1086.

Applying this principle, the Eighth Circuit found petitioners' claims completely preempted. Although couched in terms of state law, petitioners' claims actually and necessarily arise out of and present a dispute concerning interpretation of the relevant collective bargaining agreements. Thus, the Eighth Circuit concluded that because the relevant railway labor agreements form the basis of the rights asserted by petitioners and state fraudulent conveyance law "only provides an additional method for enforcing the terms of the agreements," petitioners' state law claims constitute a minor dispute under the RLA and are completely preempted. *Id.* at 1087.

Petitioners contend that the Eighth Circuit erred in several respects in reaching its conclusion. First, they argue that the Eighth Circuit erred in equating Section 3 of the RLA to Section 301 of the LMRA. Specifically, petitioners contend that Section 3 First lacks the pervasive nature of Section 301 because it grants the NRAB and not the federal courts exclusive

jurisdiction to construe or to enforce collective bargaining agreements.

Yet, both Section 3 First of the RLA and Section 301 of the LMRA are intended to promote stability and uniformity in the resolution of disputes arising out of collective bargaining agreements. *Deford*, 867 F.2d at 1086. That Congress may have chosen the NRAB over the federal courts as the appropriate vehicle to promote its policies does not indicate that Congress intended Section 3 First to be any less pervasive. In fact, the choice of an administrative forum for resolution of disputes arising out of railway labor agreements is an even stronger indication of an intent to completely preempt state law, given the recognized purpose of Section 3 of the RLA to provide "effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements" by keeping minor disputes "within the adjustment board and out of the courts." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). Accordingly, Section 3 First of the RLA presents even stronger evidence of Congressional intent to completely preempt state law than Section 301 of the LMRA.

Alternatively, petitioners argue that even if Section 3 First of the RLA completely preempts state law claims arising out of railway labor agreements, petitioners' claims in this case are not preempted because they do not require construction or interpretation of any relevant railway labor agreements. This argument, however, mischaracterizes petitioners' claims. Unlike the claims at issue in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. —, 56 U.S.L.W. 5412 (1988), petitioners' claims do not exist without interpretation and application of the relevant railway labor agreements. The rights petitioners assert under state law require that they first must be creditors. *See* Minn. Stat. § 513.20 (1987) (recodified as amended at Minn.

Stat. § 513.41 (3) and (4) (1988)). Petitioners' status as creditors arises solely under the terms of the relevant railway labor agreements. Since the petitioners' status as creditors—which status is a prerequisite to recovery under the state fraudulent conveyance act—"ultimately depends upon the terms of the agreement between the parties . . . [their claims] . . . are tightly bound with questions of contractual interpretation that must be left to federal law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 216 (1985).

Moreover, petitioners' contention that their claims do not require interpretation or construction of the railway labor agreements is particularly disingenuous in light of the separate action the RLEA filed in Illinois federal district court. The action sought to invoke RLA arbitration processes with respect to the sale. The action specifically alleged that Soo Line employees' rates of pay, rules and working conditions under various railway labor agreements between Soo Line and RLEA member unions would be affected by the sale. *See Railway Labor Exec. Ass'n v. Soo Line R.R. Co.*, No. C 5293 (N.D. Ill. 1987) (Westlaw, Allfeds library, DCT file). Yet, protection of economic rights allegedly conferred by railway labor agreements cannot be simultaneously subject to exclusive arbitration under the RLA and to potentially inconsistent state law.

In sum, whatever rights state fraudulent conveyance law may give creditors in general, petitioners' status as creditors arises out of and depends solely on interpretation and construction of applicable railway labor agreements. The pervasive nature of Section 3 First of the RLA and the exclusive jurisdiction of the NRAB over disputes arising out of railway labor agreements evidence a clear congressional intent to completely preempt state law actions dependent upon or arising out of a railway labor agreement. The Eighth Circuit correctly affirmed the district court.

B. The Interstate Commerce Act

The ICA gives the ICC exclusive jurisdiction to approve and to regulate acquisitions of rail lines. *See, e.g.*, 49 U.S.C. §§ 10901, 11343(a) (1982); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20 (1981). Specifically, Section 10901 of 49 U.S.C. governs the acquisition of rail lines by non-carriers and requires a non-carrier to obtain ICC approval of such acquisitions. *See, e.g., Texas & New Orleans R.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 478, 480-81 n. 1 (1928) (citing cases setting forth the ICC's interpretation requiring approval); *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d 420, 425 (3rd Cir. 1988) ("Section 10901 of the Act governs the acquisition of rail lines by non-carriers").

In 1976, Congress' concern about the financial conditions prevailing in the railroad industry led to enactment of the Railroad Revitalization and Regulatory Reform Act. *See generally* Pub. L. No. 94-210, 90 Stat. 31 (1976). Among other things, the Act granted the ICC authority to exempt individual transactions or classes of transactions from the approval requirements found in 49 U.S.C. § 10901. Pub. L. No. 94-210, 90 Stat. 42 (1976). Subsequently, in order to further reduce regulatory barriers to entry into and exit from the industry, Congress broadened the relevant exemption provisions providing that the ICC "shall" exempt a transaction from approval requirements if the approval is not necessary to carry out the transportation policies set forth in 49 U.S.C. § 10101(a) and the transaction is of limited scope or the approval is not needed to protect shippers from the abuse of market power. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1912-13 (codified at 49 U.S.C. § 10505).

In 1986, after notice and review of comments submitted by twenty-two parties including petitioners RLEA and United Transportation Union, the ICC responded to the congressional directive contained in the Staggers Rail Act by adopting regulations granting a class exemption for acquisitions and operations requiring approval under 49 U.S.C. § 10901.[9] *See Ex Parte 392*, 1 I.C.C.2d at 817.[10] In adopting the class exemption, the ICC expressly considered arguments that Class I carriers such as Soo Line "would attempt to divest themselves of marginally profitable lines and that the new carrier would not be financially viable and might not be able to provide adequate service." *Id.* at 812. The ICC responded that "[c]ommentators' concerns about the financial viability of new carriers are not supported by any specific evidence." *Id.* In addition, the ICC noted that:

> Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer

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[9] The class exemption does not apply where "another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 CFR 1180.3(c)." 49 C.F.R. § 1150.31 (1986); *Ex Parte 392*, 1 I.C.C.2d at 810.

[10] Pursuant to the regulations adopted by the ICC and applicable to this case, the exemption becomes effective seven days after it is filed with the ICC. 49 C.F.R. § 1150.32(b) (1986). The ICC has subsequently amended its regulations slightly expanding the notice requirements for transactions creating new Class I or Class II railroads. The regulations now provide for a pre-filing notice period of at least 14 days and for a post-filing notice period of at least 21 days. *See* 49 C.F.R. § 1150.35 (1988); *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 4 I.C.C.2d 309 (1988).

> before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Id. at 813. Thus, the ICC rejected a requirement that new carriers demonstrate their financial ability, reasoning that "smaller carriers are more dependent on local traffic, have a greater incentive to provide service tailored to the needs of shippers, and may make more efficient use of abandoned or underused rail property." *Id.*

Moreover, in promulgating its exemption regulations, the ICC also considered suggestions that the required notice of exemption "be broadened to include more detailed financial and operating data." *Id.* at 817. The ICC rejected the suggestions and eliminated a proposed rule requiring the notice of exemption to include "[t]he amount of projected revenues that will be generated in the first year by operations of the property." *Id.* The proposed rule set forth in Fed. Reg. 3488, which was to be codified at 49 C.F.R. § 1150.33(h), was rejected by the ICC. In so doing the ICC stated that while it did not intend to minimize the concerns expressed in the suggestions, it believed the revocation procedure was "adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case." 1 I.C.C.2d at 817.

Finally, in adopting and implementing the class exemption regulations, the ICC has stressed the need for swift and certain processing of exemption notices recognizing that "[t]he ability to begin operations promptly is a key to the exemption's success." *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901,* 4 I.C.C.2d 309 (February 11, 1988). As the Chairman of the ICC has stated:

> The beauty—to some, the problem—with the existing procedures is that the parties can know in advance the effec-

> tive date of their right to proceed. Opponents cannot therefore use the threat of protracted and expensive litigation to thwart a transaction or extract concessions that are not warranted by the public interest and would not be imposed by the Commission. The Commission retains full power after the fact to make any publicly required adjustments through revocation proceedings, the streamlined, management-by-exception format encourages the principals to concentrate on the marketplace, not the regulator.

Id. (separate comments of Chairman Gradison).

From the foregoing, it is clear that in promulgating class exemption regulations pursuant to congressional directive, the ICC considered and rejected, in a class-wide context, the type of arguments petitioners now seek to raise. Moreover, in doing so the ICC sought to provide interested parties swift and certain approval of proposed rail transactions, free of confusion and protracted litigation. By challenging in state court the Soo Line's sale of rail assets, petitioners disregard the delegated authority and expertise of the ICC and introduce into the transaction the very uncertainty the ICC designed the exemption process to avoid.

Notwithstanding the class exemption available to respondents, however, petitioners had the opportunity to raise specific financial arguments before the ICC. In its petition to the ICC for revocation of exemption, the RLEA submitted financial data and analysis relevant to the transaction. In response, Wisconsin Central submitted additional financial data. In rejecting the petition, the ICC summarized the financial evidence stating:

> Prior to consummation, WCL studied the lines using a computerized financial model to assist in developing op-

> erating expenses and financial data. Over 110 shippers, representing approximately 75 percent of the traffic base, were consulted concerning WCL's projected operation of the lines. Based on these studies, WCL determined that the present traffic volumes can support a profitable regional railroad. WCL projects a total first year traffic volume of 145,000 carloads, primarily of paper and related products, but also including coal, chemicals, malt, forest products and roofing granules. Its operating experience through January 1988 supports these estimates. Its originally projected operating ratio is 71 percent for 1988 with fixed charge coverage of 2.1. It anticipates that internal funds from operations will support a 5-year $36.6 million capital expenditure program. WCL's initial capitalization was $145 million, which included $15 million in equity and a cash balance of $13 million for working capital.

Revocation Decision at A-19-A-20. Based upon such information, the ICC concluded that, "RLEA's prediction that both WCL and Soo will fail as a result of the transaction is not supported by our analysis of the transaction. . . ." *Id.* at A-27. Thus, the record in this case clearly indicates that a federal forum and remedy was available to petitioners.

In sum, the statutory and regulatory framework set forth above and the scope of the revocation proceedings before the ICC evidence the broad authority Congress delegated to the ICC to regulate acquisitions of rail assets. Such broad authority and petitioners' extensive participation in the exemption process, clearly indicates a congressional intent to completely preempt the claims petitioners seek to raise under the guise of state fraudulent conveyance law. As the Eighth

Circuit stated, "[t]o allow Deford to now bring a state law action would be to disregard the ICC's authority and expertise in this matter." *Deford*, 867 F.2d at 1089.

Not surprisingly, the case law also supports the Eighth Circuit's application of this Court's complete preemption principles. In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court considered whether federal regulation of rail abandonment under the predecessor of 49 U.S.C. § 10901—former section 1(18) of the ICA—preempted state law. In finding that the federal regulations preempted state law causes of action for damages arising out of an abandonment, this Court stated that, "[t]he Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes." *Id.*, 450 U.S. at 324. In addition, this Court noted that "it would be inconsistent with [federal] policy . . . if local authorities retained the power to decide whether the carriers could do what the Act authorized them to do." *Id.* at 318 (quoting *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 87 (1958)).[11]

In the instant case, however, petitioners seek to create such an inconsistency by placing authority in the hands of a state

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[11] Petitioners rely on *Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), as supporting their position. *Hayfield* is distinguishable, however, on the ground that it involved attempted state regulation after the ICC had brought its "regulatory mission to an end" and had allowed the carrier to abandon its line. *Id.* at 633. Significantly, even at that point, the Court limited its holding allowing the state to exercise its authority only so long as it did not "undo the very purposes for which the Commission authorized an abandonment." *Id.* at 633 n.11. In the instant case, the ICC expressly retained jurisdiction to revoke the exemption it has granted, and in fact entertained such an action allowing the petitioners to fully participate. *See* Revocation Decision, *supra*. In addition, the relief petitioners seek in state court is to undo the very transaction the ICC has authorized.

court to rescind a transaction the ICC has previously considered and authorized both in the general context of class exemption and on an individual basis in a petition for revocation. As the Eighth Circuit recognized, "it would be contrary to both the letter and the spirit of *Kalo Brick* to allow Deford and the RLEA to avoid the ICC's approval of the transaction . . . by pleading a state law claim." *Deford*, 867 F.2d at 1089.[12]

In sum, the statutory framework of the ICA and the class exemption regulations promulgated thereunder, the proceedings before the ICC relating to the transaction here at issue, and the relevant case law support the conclusion of the Eighth Circuit that:

> [t]he ICA demonstrates Congress' intent to delegate to the ICC the exclusive responsibility to evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

Id. at 1091.

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[12] Petitioners attempt to distinguish *Kalo Brick* on the ground that it reserves the question whether a state cause of action lies "when no application is made to the Commission." In response, it is first important to note that the application referred to by the Court is that of the carrier. The case is clear that although *Kalo Brick* appeared in opposition to the respondent's application to the ICC, Kalo Brick failed to perfect its filing before the Commission. 450 U.S. at 314. Second, as in *Kalo Brick*, the ICC actually considered the carriers' position in this case. Third, as demonstrated *supra*, if anything, petitioners are in a weaker position than their counterpart in *Kalo Brick* because the Commission actually considered the merits of their contentions.

II. THE APPARENT CONFLICT OF A DECISION OF THE THIRD CIRCUIT WITH THE EIGHTH CIRCUIT'S DECISION DOES NOT WARRANT REVIEW.

In its decision, the Eighth Circuit acknowledged the Third Circuit's decision in *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988) (hereinafter "*P&LE*"), reaching a contrary result. Relying on *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24-26 (1983), the Third Circuit identified the threshold issue to be "whether the statute relied upon by the defendant as preemptive contains civil enforcement provisions within the scope of which the plaintiff's state claim falls." 858 F.2d at 942. In contrast, the Eighth Circuit found the approach in *P&LE* "unnecessarily narrow." *Deford*, 867 F.2d at 1086. Thus, the Eighth Circuit found that in addition to the factors identified in *P&LE*, the history and purpose of the federal statute must also play an important role in the fundamental inquiry whether Congress intended to displace state causes of action. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

Although the Eighth Circuit's opinion correctly states and applies the law relating to the complete preemption doctrine set forth by this Court, it is important to note a factual distinction between the instant case and *P&LE*. In adopting class exemption regulations, the ICC found that "the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of *substantially all* of these transactions is not necessary to carry out the national transportation policy." *Ex Parte 392*, 1 I.C.C.2d at 812. Rather, the ICC indicated that "[i]n light of the explicit legislative directive to grant exemp-

tions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present." *Id.*

In the instant case, the ICC confirmed that despite considering and rejecting generalized arguments concerning the financial viability of acquiring parties in promulgating its class exemption rules, petitioners' specific concerns regarding the financial viability of Wisconsin Central and Soo Line "may be adequately addressed in the context of petitioners to revoke the exemption." Appendix B at A-44. Thus, in the instant case, the RLEA actually submitted to the ICC a petition for revocation setting forth its contention that, among other things, neither Soo Line nor Wisconsin Central would be able to meet their financial obligations as a result of the transaction. Revocation Decision at A-14-A-17. The ICC actually considered the RLEA's contentions and rejected them. *Id.* at A-27. In contrast, the transaction at issue in the *P&LE* case failed before the ICC had an opportunity to consider the RLEA's concerns regarding financial viability. *See* RLEA's Motion for Dismissal of Complaint upon Suggestion of Mootness, *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, Finance Docket Nos. 31121, 31122, 31126 (November 3, 1988); *see also* Brief for the Interstate Commerce Commission at 6 n.5, *Pittsburgh and Lake Erie R.R. Co. v. Railway Labor Exec. Ass'n.*, Nos. 87-1589, 87-1888 (U.S. January 1989) (stating that RLEA's petition is pending before the Commission). Thus, the concern expressed in *P&LE* that federal law did not provide a forum in which to attack a rail acquisition on financial grounds, *P&LE*, 858 F.2d at 942, is adequately addressed in the instant case because the ICC actually considered petitioners' claims in the context of their revocation petition.

In addition, it is important to note that the Third Circuit did not address the mootness issues raised by the failure of the transaction at issue in *P&LE*. *Id.* In contrast, since consummation of the transaction here at issue, Wisconsin Central has been and continues to be a completely independent and self-sufficient railroad. Therefore, in sharp contrast to the theoretical jurisdictional question the Third Circuit addressed in *P&LE*, the Eighth Circuit confronted the very real question whether a state court possessed the authority to terminate the operations of a successful and ongoing regional rail enterprise. *Cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976) (stating that the mootness doctrine assures "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions"). In sum, although the Third Circuit's decision in *P&LE* is in apparent conflict with the Eighth Circuit's decision in the instant case, the fact that the transaction at issue in *P&LE* never took place counsels against using the *P&LE* decision as a basis for exercising this Court's discretionary review.[13]

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[13] Petitioners also contend the Eighth Circuit's decision conflicts with *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987). *Price*, however, dealt solely with the issue whether Section 2 Fourth of the RLA, 45 U.S.C. § 152 (1982), completely preempted state law claims for wrongful discharge in retaliation for union organizing activities. *Price*, 829 F.2d at 874. The Ninth Circuit examined Section 2 Fourth and found that although an implied private right of action exists under the Section 2 Fourth, there was insufficient evidence of congressional intent to displace state law to support a finding of complete preemption. Given the totally distinct histories, purposes, and remedial frameworks of Section 3 First and Section 2 Fourth, the Ninth Circuit's decision concerning the preemptive effect of Section 2 Fourth does not present a conflict to this Court.

III. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE AND CONCERN TO WARRANT DISCRETIONARY REVIEW.

In a number of recent opinions, this Court has clearly set forth the principles the federal courts must follow in deciding issues concerning the doctrine of complete preemption. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 56 U.S.L.W. 4512 (1988); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The Eighth Circuit's opinion in this case, far from constituting "a dramatic expansion of the complete pre-emption doctrine," Petition for Writ of Certiorari at 22, faithfully follows the clear principles set forth in this Court's cases concerning complete preemption. Further clarification of the complete preemption doctrine in the context of this case will not produce additional clarity or meaningful development in the law.

Certainly, rail transactions such as that at issue in this case represent a significant development in the nation's rail transportation policies. By requiring the ICC to exempt classes of rail transactions, Congress has been in the forefront of the policy development. *See* 49 U.S.C. § 10505 (1982). Through the ICA and the RLA, Congress has sought to develop nationwide policies that encourage efficient use of the nation's railroad resources. The policies represent a careful balance of the interests of many varied groups and regions. As a result of the balance that has been struck, the short-line and regional rail sector has enjoyed substantial growth and has created jobs and service where abandonment once appeared imminent.

This Court must not allow petitioners to frustrate carefully crafted and successful national rail policy by using state law to create confusion, to threaten recisions of completed rail asset acquisitions, or to break up strong and competitive regional rail carriers.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

WISCONSIN CENTRAL LTD. — EXEMPTION ACQUISITION AND OPERATION — CERTAIN LINES OF SOO LINE RAILROAD COMPANY

Finance Docket No. 31102

INTERSTATE COMMERCE COMMISSION

July 8, 1988

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Simmons concurred in the result with a separate expression. Commissioner Lamboley dissented and will submit a separate expression at a later date.

OPINION:

On September 4, 1987, Wisconsin Central Ltd. (WCL), a non-carrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate 1,801 miles of the Soo Line Railroad Company (Soo) rail line in Wisconsin, the upper peninsula of Michigan, Eastern Minnesota, and northern Illinois.[1] Additionally, WCL acquired 173.6 miles of trackage rights over Soo lines, and Soo assigned 27.7 miles of related trackage rights on two third party carriers.[2] WCL has also negotiated the purchase of 206.7 miles of line currently abandoned by Soo[3] but does not now seek Commission authorization to operate over that abandoned property.

We stayed the notice of exemption by decision issued September 11, 1987, noting that the proposal contemplated an

[1] See Appendix A, Part 1.

[2] See Appendix B.

[3] See Appendix A, Part 2.

"unusually large and significant transaction." On September 22, 1987, we denied a petition for reconsideration of the stay in order to consider comments which we had solicited in our September 11 decision and which we had not yet received. On October 8, 1987, in response to overwhelming public support for the transaction and requests that we lift the stay and allow the transaction to go forward, we vacated the stay and permitted the transaction to be consummated. We stated then that we would issue a further decision addressing the comments which we received. We do so here.

On October 11, 1987, WCL consummated the purchase and began operations. We have studied this transaction to determine the propriety of using class exemption procedures[4] for this large transaction, the adequacy of information provided, the transaction's competitive effects, and its effects on labor interests. Since the consummation, two petitions to revoke have been filed, one by the Railway Labor Executives' Association (RLEA) and one by the Organization of Minority Vendors, Inc. (OMV). We deny the requests for discovery, investigation, and revocation.

With the partial deregulation brought about by the Staggers Rail Act of 1980, the Commission has followed a consistent policy of aiding the development of new and innovative rail operations and discouraging the abandonment of rail lines when opportunities for continued viable rail operations are available. One overwhelmingly beneficial result of these policies has been the formation by non-carriers of numerous short-

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[4] The Commission exempted non-carrier acquisition of rail lines from the requirements of 49 U.S.C. 10901 in Class Exemption for the Acquisition and Operation of Rail lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd sub nom. Illinois Commerce Commission v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (Exemption—Acq. & Op.).

line and regional railroads under our class exemption from the formal requirements of Section 10901 for new rail acquisitions. WCL's use of this class exemption has received extensive public support. The decision that follows concludes that application of Commission policy (which promotes opportunities for continued rail service by new entities without extensive prior regulatory review) to the present transaction is in the public interest.

PRELIMINARY MATTER — TREATMENT OF CONFIDENTIAL INFORMATION

In our decision served September 22, 1987, we placed under seal several documents that WCL volunteered under a request that they be kept confidential. The documents include the Asset Purchase Agreement, dated April 2, 1987, and final drafts of trackage rights agreements (1) for WCL to operate over Soo Lines between (a) Withrow and St. Paul/Minneapolis, MN, (b) Duplainville and Milwaukee, WI, and (c) Superior and Ladysmith, WI, and (2) for Soo to operate over WCL's lines betwen (a) Withrow, MN and Dresser, WI, (b) New Lisbon and Wausau, WI and (c) Duplainville, WI and Chicago, IL. Also included were final drafts of a voluntary coordination agreement, as amended by two appendices and an agreement on "divisions and rates" also amended by two supplemental draft documents dated September 9, 1987.

The Wisconsin/Upper Michigan Rail Users Committee, et al. (Rail Users Committee), RLEA and the Wisconsin Department of Transportation (WisDot) have challenged our decision to keep the information confidential arguing that this treatment of evidence is not in the public interest. Our rules provide for confidential treatment of proprietary information. 49 CFR 1104.14 and 1114.21 et seq. The Commission has the discretion to determine whether to release con-

fidential information and this treatment is regularly accorded to parties in this type of proceeding. See, e.g., Finance Docket No. 30891, Paducah & Louisville Railway, Inc. - Acquisition and Operation Exemption - Illinois Central Gulf Railroad Company, (not printed), served January 28, 1988.

We accepted WCL's documents under seal because they resolved factual allegations and concerns expressed to the Commission over the acquisition that initially prompted our stay and our investigation and because release of the information could have adverse effects on WCL and on Soo. We did not order production of those documents and under our discovery rules, the production of documents in any proceeding before us is only available pursuant to our direct order. 49 CFR 1114.21(b)(2). Furthermore, our class exemption rules do not require their production. See 49 CFR 1150.33. WCL could have pursued less candid approaches to persuade the Commission to lift the stay. Instead WCL made a complete disclosure of those aspects of the transaction that prompted the most concern, particularly the restrictions on the rights transferred to WCL. We encourage this candor.

Our review of the parties' expressed reservations over the acquisition demonstrated no need for access to this information in order for any party to protect itself or to present its position to us. We will not release information potentially harmful to the providing party based on generalized complaints or broad discovery requests.[5] Discovery requests must show both that the evidence is relevant to the legitimate interests of the requesting party and is not otherwise available. Finance Docket No. 31116, Buffalo & Pittsburgh Railroad, Inc. - Exemption - Acquisition and Operation of Lines in

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[5] RLEA requested these documents and other information. RLEA's discovery motions are discussed separately infra at 12-13.

New York and Pennsylvania (not printed), served April 7, 1988 (Buffalo & Pittsburgh).

In affirming our September 22, 1987 decision not to make these documents public, we recognize the value of parties voluntarily providing such information when its availability would expedite our review of a matter that initially generates public concern. Unrestricted release of this information without a demonstration of specific need would discourage voluntary submission of proprietary information in future proceedings as well as punish WCL for its good faith attempt to show the effect of its acquisition. The submission of information under seal allows us to review the transaction in depth without exposing the information to use by competitors (or their shippers). Nevertheless, we may refer to confidential information and disclose that evidence, as required, in our decision. Santa Fe Southern Pacific Corp. - Control SPT Co., 2 I.C.C. 2d 709, 805, n.98 (1986).

We will disclose below information regarding this transaction sufficient to explain our reasons for concluding that further investigation or revocation of the exemption is not warranted. This information includes overhead traffic restrictions, Soo's trackage rights over WCL, and certain elements of the transaction affecting labor interests. In our disclosure, we have tried to maintain the confidentiality of most of the information provided, while assuring the public that the information sought to be disclosed would not warrant a contrary conclusion. We find that no competitive harm will occur to either WCL or Soo by our limited release of information received under seal.

In disclosing this information, we note that most if not all of it is or will be publicly available. A significant amount of the information, particularly regarding labor matters, has be-

come available through discovery in RLEA v. Soo Line R.R., Civ. No. 87 C 5293 (N.D. Ill. 1987).[6] Other information, including restrictions to WCL's trackage rights over Soo or Soo trackage rights over WCL, has or will become available either through tariff publications or as shippers use Soo's service over those lines. We do not take the release of this information lightly, especially in view of WCL's expectation in providing it to us. Nevertheless, on balance we believe this course to be appropriate.

BACKGROUND

WCL and Soo entered into the agreement of sale on April 2, 1987. The agreement was conditioned upon the parties obtaining either an exemption from or approval under 49 U.S.C. 10901, which governs non-carrier acquisitions and operations. The agreement provides for all necessary line transfers, easements, licenses, contracts, inventories, car and track materials, and ancillary agreements required for rail operations.

Pursuant to the agreement, WCL purchased approximately 2800 freight cars and 29 locomotives. Under the agreement Soo retains certain non-rail related easements and the right of first refusal to buy back the lines if WCL contracts to sell any or all of its lines to a Class I carrier or if WCL proposes to merge with a Class I carrier.

The sales agreement is supplemented by several voluntary coordination agreements and agreements on rate divisions. These agreements generally provide incentives for WCL to interchange traffic with Soo, to maintain existing rate levels,

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[6] In that proceeding, RLEA sought declaratory and injunctive relief to "enforce various commands of the Railway Labor Act," 45 U.S.C. 151 et seq. (RLA). RLEA sought to compel Soo to exhaust the collective bargaining processes of the RLA prior to consummation of WCL's purchase. RLEA's complaint and petition was rejected by decision of the court dated September 10, 1987.

and to provide for new divisions of revenues, based on existing rates and subject to a 25 percent minimum for the short haul. Both carriers agree to maintain alternative routes with other carriers and specifically preserve their rights of independent action to achieve their long hauls. Provisions are made for exchanges of information, solicitation of joint traffic, terminal switching charges, and coordination of service to improve "the quality, effectiveness and efficiency of their joint interline freight operations."

A substantial portion of the lines transferred comprised Soo's Lake States Transportation division (LST) which included some of the lines Soo obtained pursuant to the Commission's authorization of the sale of the core properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (Milwaukee), to the Soo.[7] The LST lines were operated by Soo as a separate business unit. They are light density lines that averaged only 74 revenue movements per mile in 1986, but have been marginally profitable.

Besides its connections with Soo, WCL will connect with all roads serving Chicago and Minneapolis/St. Paul, MN, as well as with the Canadian Pacific Ltd. (CP), and Algoma Central Railway at Sault Ste. Marie, MI, and the Chicago & North

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[7] Chicago, M. St. P. & P. R.R. Co.—Reorganization—Acquisition by Grand Truck, 2 I.C.C.2d 161 (1984), aff'd, 2 I.C.C.2d 427 (1985), aff'd sub nom. In Re Chicago, M. St. P. & P. R. Co., 799 F.2d 317, 337 (7th Cir. 1986), cert. denied, 107 S.Ct. 2460 (1987) (Milwaukee). On February 19, 1985, Soo consummated its acquisition of the Milwaukee core and subsequently invoked the corporate reorganization class exemption (49 CFR 1180.2 (d)(3)) to merge Milwaukee Road, Inc., its subsidiary that operated the Milwaukee core, into itself. See Finance Docket No. 30761, Soo Line Railroad Company—Merger—The Milwaukee Road Inc.; Minneapolis, Northfield and Southern Railway, Inc. (not printed), served January 17, 1986 (Soo Line Merger).

Western Transportation Company, Escanaba & Lake Superior Railway Company, Green Bay & Western, Lake Superior & Ishpeming Railroad Company, Marinette, Tomahawk & Western Railroad Company, Nicolet Badger Northern Railroad, Wisconsin & Calumet Railroad, and Wisconsin & Southern Railroad Co. at various points throughout its system. WCL also has connections with other small carriers.

The sales agreement and especially the trackage rights agreements over lines retained by Soo, are subject to restrictive covenants. These restrictions preclude WCL from participating in overhead traffic Soo can or does handle. WCL's three trackage rights agreements with Soo grant WCL a non-exclusive right to use the lines, excluding "overhead traffic," which is defined as "any traffic originating at, terminating at, or moving through . . . [(1) Minneapolis/St. Paul, (2) Duluth/Superior or (3) Milwaukee] and not ultimately destined to or originating at (1) consignors or consignees physically located on trackage of . . . [WCL] or (2) points in Ontario west of Sudbury, in Upper Michigan or in Wisconsin north of Soo's main line between LaCrosse and Milwaukee." There are no other interlining restrictions, even on overhead traffic flows. The trackage rights agreements also preclude local service, assignment of rights to third parties, and generally any new construction. The detour or operation of foreign line equipment is at the sole discretion of Soo. The failure to observe these restrictions may result in Soo's unilateral termination of the trackage rights agreement(s).

An additional provision applies to the Ladysmith line, and it is the only such restrictive covenant in the sales agreement. If WCL handles "overhead traffic" or enters into an agreement with any other carrier that would allow WCL to handle overhead traffic through Duluth/Superior within 7 years

from the date of consummation, then WCL, at Soo's discretion, is obliged "to purchase, lease or otherwise acquire the Ladysmith Line." Disputes regarding the forced purchase will be referred to a panel of arbitrators.

WCL granted to Soo three separate trackage rights. First, Soo obtained a non-exclusive bridge right over approximately 26 miles of track between Withrow and Dresser, WI to a rock quarry operation, known as the Dresser Pit, and a contract right allowing Soo to purchase rock there for Soo's maintenance and construction requirements. Soo also retained a right of first refusal to purchase this line if WCL subsequently obtains abandonment authority for it.

Second, Soo is granted non-exclusive trackage rights over approximately 91 miles of track between New Lisbon and Weston, WI to provide unit train coal service to Wisconsin Public Service Corporation at Weston, WI. Soo also retained the right of first refusal to purchase if the line is subject to abandonment.

Third, Soo is granted approximately 92 miles of trackage rights between Duplainville, WI and Forest Park, IL. Additionally, the parties exchanged operational control of tracks in each other's ownership between Forest Park and Chicago, IL. This includes Soo's connecting track with the Indiana Harbor Belt Railroad. As part of this arrangement, Soo retained a temporary right to continue its operations at its Schiller Park, IL intermodal facilities until Soo either relocates the facility or discontinues its use. Soo also agreed to construct a new connection at Duplainville and to upgrade certain track at Schiller Park, IL prior to any discontinuance.

POSITIONS OF THE PARTIES

1. Comments. We have received and reviewed over 100 pleadings relating to this transaction and numerous letters

and comments from interested parties and press reports, as well as the comments of the Chicago and North Western Transportation Company (CNW), filed September 18, 1987, the Iowa Department of Transportation, filed September 25, 1987, and Michigan-Wisconsin Transportation Company, filed September 23, 1987. Generally, these comments support the WCL transaction.

For example, numerous corporations, including Mead, Nekoosa Paper Inc., D.C. Northam, Inc., Kimberly-Clark Corporation, Sadoff and Rudoy Industries, Kaytee Products, Vulcan Materials Company, Menasha Corporation, Weyerhaeuser Paper Company, and others, requested lifting of the stay and/or denial of the petition to revoke. While generally agreeing that WCL experienced the start-up problems common to new businesses, these corporations state that WCL service has improved significantly, that WCL employees have shown competence and enthusiasm in providing service, and that WCL provides essential rail service for them. Several corporations also state that WCL service is currently superior to that which they received from Soo, and shippers expect service to improve even more.

Government and other public groups also generally support the transaction. For example, the Area Development Committee of L'Anse, Michigan, Minnesota Department of Transportation, Central Upper Peninsula Planning and Development Regional Commission, Marshfield Area Chamber of Commerce and Industry, Transportation Development Association of Wisconsin, Illinois Department of Transportation, and Stevens Point/Plover Area Chamber of Commerce Transportation Committee all agree that WCL provides service critical to the economic well-being of their areas. Individual citizens, WCL employees, and Congressmen and Senators have also filed statements supporting the transaction.

A small number of negative or neutral comments were received from corporations or public groups. For example, GAF Chemicals Corporation detailed WCL start-up problems that it experienced during October 1987 and requested resolution of these problems. Similarly, the town of North Fond du Lac, WI remained neutral regarding the exemption and requested that we consider employee concerns and local economic impacts in making our determination. None of these parties has requested revocation of the exemption following the lifting of the stay.[8]

Rail Users Committee, an ad hoc coalition of shippers organized through the Wisconsin Paper and Pulp Manufacturer's Association, Inc., with the assistance of the Wisconsin Association of Manufacturers & Commerce, Inc., filed comments on September 8, 1987 and a petition to lift the stay of the transaction on September 11, 1987.

In its September 8 comments, the Rail Users Committee expressed concern over insufficient information relating to WCL's financial ability and operating plan, and competitive restrictions on WCL regarding bridge traffic trackage rights, gateways and interchange connections. It states that "there are restrictions on competition privately negotiated between the seller and purchaser which the shippers are entitled to have disclosed, to have the opportunity to contest and to be resolved. . . ." The Rail Users Committee requested that an investigation be instituted, and discovery authorized, and that the parties then either resolve the issues or request further specific Commission action.

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[8] Numerous Soo employees have also written us describing hardships they have undergone from losing jobs, seniority rights, and other benefits. Employees also argue that the transaction unfairly deprives them of protective conditions imposed when Soo acquired certain lines from the Milwaukee.

In its September 11 pleading, Rail Users Committee stated its "unequivocal support for the transaction to proceed under the class exemption." Rail Users Committee monitored the evolution of this transaction for an 18-month period prior to the filing of the notice of exemption. It notes that, during this time, service over LST lines deteriorated and became increasingly less competitive. It anticipates that, without WCL's operations, serious additional diversions of traffic would occur. The Rail User Committee fears that the regional rail system will be permanently lost without WCL. It notes that shippers refrained from making major modal commitments in anticipation of improved rail service by WCL. Loss of these shippers will place an increased burden on captive shippers to support the remaining operation of lines. It characterizes the transaction as a positive and procompetitive approach that is demonstrated in the availability of competing connections. Rail Users Committee concluded that no regulatory intervention is preferred to intervention that would jeopardize the transaction.

WisDOT filed a statement on September 10, 1987, supporting the transaction but also requesting an investigation although it had independently investigated the transaction, analyzed pertinent data and participated in various public meetings. WisDOT nevertheless supported the prompt consummation of the transaction as being in the public interest. WisDOT states that its request for an investigation is intended to allow affected parties sufficient time to determine the ramifications of the transaction so that they may decide whether to seek revocation of the exemption. It questions whether WCL will be a Class I or Class II carrier, but its major concern is over the competitive situation between Soo and WCL. It requests that any conditions on gateways, bridge

traffic and trackage rights under the WCL-Soo agreement be disapproved. Wisconsin DOT also requested a 180-day period for the parties to obtain information concerning the competitive aspects of the transactions, potential service and rates.

WisDOT also requests clarification of the impact of the Commission's exemption process, including whether WCL is subject to securities regulation by the State of Wisconsin or to review by WisDOT, whether abandoned rail lines in Wisconsin are subject to prior acquisition by the State before the restoration of service or before scrapping, whether WCL can abandon lines not previously approved for abandonment pursuant to the exemption, whether WCL is required to honor Soo transportation contracts under 49 U.S.C. 10713, whether previously ordered interchange conditions must be preserved by WCL, and whether previously imposed environmental conditions must be maintained.

On February 8, 1988, WisDOT filed a reply to a petition to revoke and requests for discovery and oral hearing filed by RLEA. It continues to support WCL and opposes RLEA's petition for revocation. It states: "WCL is providing essential freight rail service on 1,754 miles of operating lines in Wisconsin." (Reply, at 2) [Emphasis omitted.] WisDOT also expresses support for Commission policy in this area. WisDOT says that, in its view,

"the Commission's policy does preserve rail service in the private sector without government financial support; it does provide a better opportunity for protecting the employment prospects of affected labor; and it does avoid the piecemeal, segmented abandonment process that, even with governmental financial assistance, entails inherent service disruption or unprofitable operation until a sensible combination of abandoned lines can be linked together." (Reply, at 3-4).

2. Petitions for revocation: RLEA and the Organization of Minority Vendors. RLEA requests that the exemption be revoked in whole, or alternatively in part to provide employee protective conditions. It challenges the transaction on the basis that it is inconsistent with four elements of the rail transportation policy—subsections 10101a(10), encouraging "honest and efficient management of railroads"; 10101a(12) encouraging "fair wages and suitable working conditions"; 10101a(14) ensuring the availability of accurate cost information in regulatory proceedings; and 10101a(15) fostering "sound economic conditions in transportation." RLEA maintains that the sale was made economically feasible only because of the marked decrease in remuneration to WCL's employees. RLEA alleges that the sales agreement contains provisions that directly violated employee protective agreements resulting from Soo's acquisition of former Milwaukee lines.

In its evidence in this proceeding, RLEA includes a copy of its own purchase offer. In support of its comments, RLEA's financial advisor, Mr. Brian M. Freeman, states: "The value of labor cost reductions under almost all of the scenarios we have considered provides essentially the only justification for the purchase price." V.S. of Brian M. Freeman, dated September 18, 1987, page 10. He continues that increases in the traffic base are speculative and could be obtained by Soo if there were more effective management. His conclusion concerning the financial status of both WCL and Soo is that neither carrier is likely to be able to meet its financial obligations, particularly considering the "loss of commonality" for the LST lines with the Soo and CP.

RLEA maintains that ultimately WCL will fail because of the highly leveraged nature of the acquisition. The Commis-

sion's review of the transaction, RLEA maintains, is required to protect other creditors, shippers, employees and the public. It calls the consortium of lenders' endorsement of the transaction self-serving, because these creditors are protected by WCL's assets and would stand to profit if WCL fails. It points to the situation with the Pittsburgh and Lake Erie Railroad as indicative of a similar situation in which a highly leveraged company could no longer service its debt obligations. Accordingly, it maintains that WCL's acquisition is inconsistent with encouraging sound economic conditions under section 10101a (10). RLEA does not argue that the Commission must make a finding of financial fitness for WCL to acquire Soo's lines here, but rather that the Commission must determine that WCL is financially able to provide present and future service.

RLEA also objects to the requirement that WCL's new employees must relinquish their employee rights with Soo prior to being hired, and must subsequently depend on WCL, which RLEA maintains is financially unsound, for their future financial security. It maintains that this requirement is merely a means to circumvent collective bargaining agreements and previously imposed labor protective conditions. Under those agreements, any employee who resigns employment with Soo automatically forfeits any rights under those agreements.[9]

RLEA notes that in Soo Line Merger, supra, the Commission imposed the conditions developed in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). It argues that these conditions remain in effect and the WCL acquisition is a transaction within the meaning of those conditions, which among other protections,

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[9] The resignation form provides that signatories relinquish their employment rights with Soo "but expressly reserve any claim" they have against Soo.

protect the seniority rights of affected employees. Soo's obligation under section 6(c) of the New York Dock conditions requires Soo to continue these protective benefits, even when furloughed employees have taken jobs with other employers, including other railroads. Such outside income is only allowed as an offset under the New York Dock conditions. These protections are also included in employee protection agreements entered pursuant to Milwaukee, supra. Among the employee protective agreements submitted to the Commission is that between the International Brotherhood of Electrical Workers and Soo, dated July 18, 1985, which contains both income and seniority right protections. RLEA maintains that the sales agreement violates these employee protections and requires corrective action by the Commission.

RLEA points to CNW's sale of its Fox River Valley lines considered in Finance Docket No. 31205, FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and Northwestern Transportation Company (FRVR),[10] as an indication of the adverse effect on competing rail carriers and their employees. It cites testimony in that proceeding that CNW could not compete with "WCL's lower wages,

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[10] Notice of exemption was made in Finance Docket No. 31205, FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company (not printed), served January 11, 1988, and supplemented in a notice served March 18, 1988. In unprinted decisions, we denied a request for a stay, served January 15, 1988; granted a petition for clarification and stated our jurisdiction over labor matters, served January 29, 1988; denied a petition for a cease and desist order, served March 11, 1988; and granted discovery requests for inspections of the sale agreements, subject to a protective order, served March 18, 1988. We also served notice March 7, 1988 of the institution of a court action in Railway Labor Executives' Association v. Interstate Commerce Commission and United States of America, No. 88-1280 (8th Cir. filed February 8, 1988).

and non-traditional work rules, which resulted in overall low budget rail service."

RLEA concludes that WCL will have an adverse impact on rail employees throughout the region. RLEA points out that it has sought voluntary discovery from Soo and WCL, by requests filed September 25, 1987, and that neither carrier responded. It renews its discovery requests. RLEA also renews its requests for oral hearings to develop a record to determine whether WCL has sufficient employees to provide adequate service, to determine whether collective bargaining agreements have been violated, and to determine the extent of the burden placed on employees.

OMV filed objections to the exemption on September 25, 1987, and a petition to revoke the exemption on October 29, 1987. Perfection of service of the petition was not made until December 30, 1987. OMV seeks to prevent Soo from disposing of lines, including WCL's acquired lines in order to assist in enforcing a class action designed to assist black and Hispanic suppliers with the opportunity of doing business with certain rail carriers. The action arises from the Civil Rights Act, 42 U.S.C. 1981 and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. 801 et seq. (4R Act) and remains in litigation. It argues that the diminution of Soo's railroad assets is contrary to the principle and spirit of the 4R Act. Because the Commission must now consider whether WCL's use of the class exemption is consistent with the Rail Transportation Policy, specifically 49 U.S.C. 10101a(7), it argues that the Commission cannot allow WCL to use the exemption.

3. Replies. Soo filed comments and pleadings on September 25, and 30, 1987; and on February 6, 1988, it filed reply comments to RLEA and OMV's petitions to revoke. It has sup-

ported the transaction as pro-competitive and as the most advantageous realignment possible for the region.

In response to OMV's petition, Soo notes that OMV not only bases its requested relief on a pending lawsuit, but also requests that Soo be prohibited from disposing of any other lines. Soo argues that this latter request demonstrates that OMV's petition is not directed toward any issue that can be resolved concerning the instant acquisition and that the petition should be denied.

In response to RLEA's petition, Soo states that the compensation package it has offered to affected employees provides greater protections than those under New York Dock. Soo has offered these employees options for employment wherever available, and counseling and placement services. Soo submitted a Verified Statement of Darrell E. Ward, its Assistant Vice President Operating Administration, along with a report that shows that 1366 employees were employed on its former Lake State lines as of October 10, 1987 and that, of these, 595 employees remain to be placed or accommodated. Of the 595, the number of employees that were part of its then active work force was 298. Soo states it is continuing to attempt to resolve the status of all adversely affected employees in a mutually satisfactory manner. It notes that WCL now is a competitor and argues that WCL has not been shown to be financially unsound.

WisDot also replied in opposition to RLEA's petition. WisDot does not wish to risk further declines in rail service, which often have serious adverse impacts on rail shippers, or to jeopardize the original sale or sale arrangements. It states that it has purchased 817 miles of abandoned rail lines upon which four shortline carriers now operate and that their start-up was facilitated by the Commission's class exemption

procedures. WisDot maintains that the class exemption procedures and our policies underlying them assist in preserving rail service through private sector initiatives without government financial support and better protects the employment prospects of affected labor. The abandonment process is criticized as "piecemeal, segmented . . . [and] entails inherent service disruption or unprofitable operation. . . ." It argues that there is no legal nexus between the relief sought by RLEA and the provisions of section 10901. It further notes that the Commission authority to impose labor protective conditions is discretionary, citing Railway Labor Executives' Association v. United States, 697 F.2d 285, 286 (10th Cir. 1983). WisDot maintains that RLEA has not demonstrated any exceptional circumstance to warrant imposition of labor protection in this transaction. Finally, while it does not withdraw its previous requests for special procedures to investigate the transaction, it states that "the costs of oral hearings, if not discovery would be substantially out of proportion to any demonstrated injury. . . ." It concludes by stating that requests for oral hearing should not be granted and the exemption should not be revoked.

WCL initially filed various motions, comments, petitions, and replies to petitions on September 9, 17, 25, and 30, 1987, as well as letters of support from shippers, shipper organizations, State, local and city governments, and from financial consultants and banking interests. It also voluntarily provided a copy of the purchase and related agreements.

WCL defends its use of the class exemption process as proper, even for a transaction of this size, and also defends its financial viability and quality of its service. Prior to consummation, WCL studied the lines using a computerized financial model to assist in developing operating expenses and financial

data. Over 110 shippers, representing approximately 75 percent of the traffic base, were consulted concerning WCL's projected operation of the lines. Based on these studies, WCL determined that the present traffic volumes can support a profitable regional railroad. WCL projects a total first year traffic volume of 145,000 carloads, primarily of paper and related products, but also including coal, chemicals, malt, forest products and roofing granules. Its operating experience through January 1988 supports these estimates. Its originally projected operating ratio is 71 percent for 1988 with fixed charge coverage of 2.1. It anticipates that internal funds from operations will support a 5-year $36.6 million capital expenditure program. WCL's initial capitalization was $145 million, which included $15 million in equity and a cash balance of $13 million for working capital.

On February 6, 1988 WCL filed separate replies to the petitions to revoke filed by OMV and RLEA. With regard to OMV, it argues that OMV's demands are based on the outcome of a pending lawsuit to which Soo, not WCL, is a party and that in the event of judgment favoring OMV, Soo will remain to provide relief. WCL argues that any relief for OMV against WCL is only speculative and that OMV should first be required to establish its rights to legal redress against WCL prior to any interference with this transaction. WCL concludes that it, its employees, and its shippers should not be held accountable for the potential outcome of third party litigation.

With regard to RLEA, WCL argues RLEA has not carried its burden of proof. It maintains that RLEA is reiterating arguments that the Commission has rejected in other transactions and not demonstrated any special or unique circumstances to warrant special treatment here. It avers that RLEA

has not demonstrated specific facts supporting its petition to revoke.

WCL argues that all line sales involve debt financing and there is no reason to separate WCL from other acquisitions. Accordingly, WCL avers that the Commission cannot both require information demonstrating financial stability of new carriers and maintain the class exemption process. WCL notes that RLEA's offer to purchase these lines was also based on a leveraged buyout.

WCL points out that statements made in the FRVR acquisition, including statements that RLEA provided as evidence in this proceeding, demonstrate increased rail competition throughout the region. WCL alleges that RLEA is apparently arguing that "the Commission should impose employee protective conditions to increase WCL's costs so that a competitor [FRVR] would not suffer from, and shippers requiring rail service would continue to pay for, inefficient and burdensome labor practices." WCL continues that labor's intransigence was the cause of Soo's decision to sell these lines. It also notes that RLEA has provided no evidence to show that WCL's service has been inadequate and maintains that it is now providing efficient, shipper-responsive service at competitive rates.

WCL avers that RLEA has presented no evidence to show that WCL is dishonest or inefficient or that the wages it pays are unfair, or that its working conditions are unsuitable. WCL maintains that RLEA must first demonstrate by specific proof the validity of these claims before the Commission should act, citing in support Finance Docket No. 30555, Northwestern Pacific Acquiring Corporation and Eureka Southern Railroad Company—Exemption from 49 U.S.C. 10901 and 11301 (not printed) (Northwest Pacific), served January 8, 1988. WCL

compares RLEA's allegations of either dishonesty or inefficiency against the extensive service records of its management team and notes that these individuals are familiar with the area.

DISCUSSION AND CONCLUSIONS

1. Use of the class exemption for the acquisition and operation of WCL as modified here is appropriate. WCL is the largest railroad formed to date under these procedures. We have here studied the use of the class exemption process for the carrier of WCL's size.[11] We have two responses to those parties who opined that our class exemption procedures were never intended to or should not facilitate transactions of this size. First, there are no restrictions on the size of a carrier that can be acquired under 49 CFR 1150, Subpart D. Indeed, we noted that our original Notice of Proposed Rulemaking in Exemption—Acq. & Op., supra,[12] "expanded a proposal . . . seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction." Id at 810. We have approved use of the exemption process for other large transactions.[13] Our review in the reopened Ex Parte No. 392 (Sub-No. 1), Class

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[11] The class exemption is designed to eliminate the processing of an application or petition for exemption under 49 U.S.C. 10901 or 10505, respectively, prior to consummation of a transaction. See Exemption—Acq. & Op., supra. A class exemption does not divest the Commission of jurisdiction to scrutinize a transaction and subsequently to revoke the exemption after the fact. Consolidated Rail Corporation—Declaratory Order—Exemption, 1 I.C.C.2d 895 at 899 (1986).

[12] The notice was published at 50 F.R. 34880, August 28, 1985.

[13] See, e.g., Finance Docket No. 31089, Montana Rail Line, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company (not printed), served July 31, 1987 and May 26, 1988, involving two non-contiguous lines of 544.3 miles and 286.32 miles with bridge rights connecting them.

Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, I.C.C.2d (1988), slip op. served February 29, 1988, reaffirms use of this class exemption for large transactions, albeit with some changes in procedure. Our review reaffirmed that growth of regional carriers has helped to preserve service, jobs and rail investment. The carriers typically provide better service that is tailored to their shippers' needs. Second, and consistent with our later changes in the Ex Parte No. 392 (Sub-No. 1) class exemption rules, we modified the procedure here. We stayed the transaction and took comment. Only after reviewing the comments did we lift the stay. The comments filed and sales agreement voluntarily submitted under seal demonstrate no reason to require further detailed review under section 10901 and indicate numerous beneficial elements. In spite of some limited start-up problems just after consummation, shippers have expressed support for continued WCL operations and opposition to any revocation.

One concern involving transactions of this size is over the amount of information available to potentially affected parties to analyze the proposed transaction. Another related concern is the time available for the parties to comment on the transaction. However, in this transaction, our stay extended the normal 7-day period for consummation to almost a month[14] and we requested and received substantial public comments and information concerning the transaction. As noted, we did not lift the stay until we were satisfied that initial use of the exemption was appropriate and that it would be reasonable to review opposing comments after the fact consistent with 49 U.S.C. 10505. The vast majority of comments were positive, and our procedures still permit revocation if warranted.

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[14] The notice of exemption was filed September 4 to become effective September 11, 1987. The effective date of the exemption was stayed from September 10 to October 11, 1987.

2. Requests for investigations or for discovery are denied. At the time we lifted the stay, several formal and informal requests for hearings, special procedural orders and for discovery had been filed. We advised the parties that we would issue a further decision on the comments, but that requests for hearings or discovery were to be filed in connection with petitions to revoke. Since that time, only OMV and RLEA have filed petitions to revoke.[15] Accordingly, while we have reviewed all the comments filed, we only have need specifically to resolve the more recent requests from RLEA, OMV, and WisDot.

We will not now undertake a further investigation. In declining to institute further detailed proceedings at this time, we first note that WisDot, a principal party now seeking the investigation, supported the transaction (as did the Rail Users Committee, which earlier had sought investigation.)[16] It (and the Rail Users Committee) also supported lifting the stay, while expressing generalized concerns about the class ex-

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[15] WisDOT's request for us to address numerous general legal issues not pertinent to the merits of WCL's purchase of the Soo lines is inappropriate. We have looked at these questions in a general framework in Ex Parte No. 392 (Sub-No. 1), supra. WisDot raised similar issues in that proceeding, and although we thoroughly reviewed all of the comments, we declined to address the State law issues raised by WisDOT. We will note, generally, however, that our exemption here goes to the transaction, not to WCL's future operations, which continue to be subject to Federal regulation. Thus, by this transaction, the State obtains no new authority over WCL. WCL's obligations (if any) for agreements that Soo entered into or that we directed depends on the wording of these matters (e.g., whether they are binding on successors).

[16] We mention this group because it represents the region's affected shippers. However, it is not clear in light of our October 8, 1987 decision directing parties to file petitions to revoke should they continue to seek relief, whether this group still desires the relief it requested before we stayed the transaction and took comment.

emption procedures. They feared additional abandonments throughout the region, which has a history of rail failures, and additional losses to the regional traffic base, which has experienced considerable diversion of traffic to motor carriers, especially over the last few years.

WisDot and Rail Users Committee requested further details concerning the transaction and prospective service from WCL, and also sought restrictions on WCL's service. They sought additional information concerning interchange points, WCL's information as to financial ability, gateways, operational feasibility and restrictive covenants, and for the general operating plan. RLEA has expressed concern over possible anticompetitive restrictions on overhead traffic and competitive access, and has sought detailed information on these issues.

Chairman Gradison stated in Buffalo & Pittsburgh that discovery would be made available in connection with petitions to revoke exemptions consistent with our discovery rules. Our rules provide for discovery which is in support of and related to specific requests for agency actions. Since WisDot and the Rail Users Committee have not asked us to revoke the exemption or to take any particular remedial action regarding the sale, we will deny their request for discovery.

RLEA, as noted above has filed petitions asking that the exemption be revoked in whole or, alternatively in part for the imposition of labor protective conditions. As noted below, we have denied those petitions in this decision. We find that RLEA has not demonstrated that WCL's financial position is precarious and that it will likely fail, the chief basis for its request that the exemption be revoked in full. Nor do we find that it has shown exceptional circumstances so as to justify its request that we exercise our discretion under section 10901 to impose employee protective conditions. RLEA argues that

the discovery it seeks will enable it to support its argument that WCL is not financially viable and that the exemption does not meet the standards of section 10505.

We will permit discovery here consistent with Buffalo & Pittsburgh. As noted there, however, "[r]estrictions or even outright prohibitions against discovery may be justified in individual cases." We note that RLEA has already obtained discovery through its unsuccessful court challenges of Soo's sale of these lines. Moreover, we have disclosed some of the information concerning the transaction in this decision, and the petitioners have also disclosed considerable information regarding the transaction. Under these circumstances, RLEA will, in order to support any motion to compel the discovery of information that the petitioners are not willing to release, have to demonstrate that the information already available is not sufficient to permit it adequately to address the arguments it advances in support of revocation. We have employed and disclosed confidential information submitted by the petitioners in conducting our analysis, discussed herein, as to whether the terms of the sales agreement or the trackage rights agreement or any other aspect of this transaction appear to create a carrier which will be so financially weak as to be unable to provide adequate transportation service to the public. On the basis of that analysis, we have declined to grant RLEA's petition for revocation. If RLEA seeks discovery to file a new petition, it should, in seeking revocation, clearly establish the argument it proposes to make and the information it needs and does not have. The already protracted nature of this proceeding, the fact that significant disclosure has already been made, and the uncertainty that further consideration of requests for revocation will necessarily produce for a sale that has received widespread public support justify our making discovery available only subject to these restrictions.

3. RLEA has not shown cause to revoke the exemption, institute an investigation or modify the exemption to include labor protective conditions. We have recently issued a decision clarifying our policies affecting labor in these acquisition proceedings. FRVR, supra. A primary conclusion was that our preeminent purpose must be to preserve rail transportation. Motor carrier competition in WCL's service area has almost destroyed the rail traffic base. As we noted in FRVR, the paper industry had been a major source of rail traffic in Eastern Wisconsin. The rail share has fallen from 54 percent in 1977 to 20 percent in 1986. Id. at 4. It is our policy to encourage innovative marketing and service to rejuvenate the rail industry, and to promote improved rail service that encourages use of the rail system. There is no better way to protect the interests of rail labor than to assist in preserving viable rail operations.

RLEA's prediction that both WCL and Soo will fail as a result of the transaction is not supported by our analysis of the transaction, which is set out in section 4 below. In adopting our class exemption procedures, we considered arguments that Class I carriers would attempt to divest themselves of marginally profitable lines and that the new carrier would not be financially viable and might not be able to provide adequate service. Exemption—Acq. & Op., supra, at 812. We found that these arguments were not supported by specific evidence and were contrary to our experience. Id.

In rejecting requiring new carriers to demonstrate their financial ability through section 10901 procedures in Exemption—Acq. & Op., we noted that smaller carriers are more dependent on local traffic, have a greater incentive to provide service tailored to the needs of shippers, and may make more efficient use of abandoned or underused rail property. Id. at

813. Contrary to the position advanced by RLEA, "the loss of commonality" between WCL and Soo provides the opportunity to make the rail transportation option more attractive to shippers and communities. Furthermore, the creation of WCL provides the opportunity for more efficient management, which RLEA maintains is necessary. RLEA has demonstrated no good reason to deny WCL entry under our class exemption procedures.

As to imposition of labor protective conditions, we note that, as of February 5, 1988, 477 former Soo employees have been hired by WCL. Another 126 employees expressed interest in WCL employment but did not pursue it. The sales agreement provides that WCL's work force "will consist of not less than 750 persons." No agreement between the principals provides or requires any adverse actions against any employees. WCL's requirement that its new employees surrender their rights with other carriers, including Soo, prior to obtaining employment with WCL is not an unreasonable practice. Neither is WCL's employment of other experienced railroad personnel. These actions do not require our regulatory intervention.

RLEA has made no showing of exceptional or extraordinary circumstances to warrant labor protective conditions. Exemption—Acq. & Op., supra at 815. Exceptional situations are those, for example, "in which there was misuse of Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. [footnotes omitted]." FRVR, supra at 3. To modify any exemption, labor must "demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undo-

ing the prospective benefits of the Commission's existing policy for other communities and locales." Id. at 3-4. RLEA has not made this demonstration. We have consistently reiterated that job displacement and differing standards of employee protection do not, standing alone, constitute cause for the imposition of labor protective conditions. See, e.g., Finance Docket No. 31094, Grainbelt Corporation—Acquisition and Operation Exemption—Burlington Northern Railroad Company (not printed), served February 2, 1988, Finance Docket No. 31059, Central Michigan Railway Company—Acquisition and Operation—Certain Lines of Grand Truck Western Railroad Company (not printed), served September 4, 1987, aff'd in a decision not printed December 10, 1987, and Northwestern Pacific, supra.

RLEA has argued that the sale, and particularly the sale agreements' requirement that Soo employees resign prior to accepting employment with WCL, violated the employee protective conditions imposed in Milwaukee and in Soo Merger. Whether or not Soo may have in specific instances violated those agreements is no reason to impose new conditions here or to deny WCL use of the class exemption procedures. Any violations are remediable apart from this transaction. This transaction is not a continuation of Soo's purchase of former Milwaukee lines or their subsequent intra-corporate merger. Therefore, any adverse impact on any employee resulting directly from the sale of these lines does not require new employee protective benefits or require Commission adjudication of individual's claims against Soo. Cf. Finance Docket No. 28490 (Sub-No. 1), Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Tooele Valley Railroad Company (not printed), served March 2, 1988.

We have specifically considered the cost of labor protection, which would be very high, if it were imposed on either the WCL or the Soo. (If imposed on the Soo, the burden surely would be transferred, in whole or in part, to WCL. Soo's financial condition would not allow it to absorb the burden—a burden for which there would be little counterbalancing benefit to the public or to affected employees.) There is no assurance that imposition of costly labor protective expenses would not cause the parties to rescind the transfer. Yet, WCL is supported by the vast majority of this area's shippers, and its lower cost operations are necessary to provide effective rail competition in this region. WCL's ability to compete with other rail carriers and other modes is dependent in no small part on lower costs. The large labor expense that RLEA urges could well eliminate that advantage and has not, as discussed above, been justified under our exceptional circumstances test.

4. Revocation of the exemption is not required because of competitive restrictions on WCL. Under 49 U.S.C. 10505(d) "[t]he Commission may revoke an exemption, to the extent it specifies, when it finds application of a provision of this subtitle . . . is necessary to carry out the transportation policy of section 10101a of this title." Our review of the overhead traffic restrictions, Soo's retention of trackage rights, and related competitive concerns does not demonstrate cause to revoke this exemption in whole or in part.[17]

WCL has obtained three trackage rights agreements as part of the sales agreements. Those trackage rights[18] connect

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[17] Under our class exemption procedures, any party may, at any time, request that the exemption be revoked, in whole or in part. However, these potential petitions must be based on reasonable, specific concerns that demonstrate that reconsideration of the exemption is warranted. Simmons v. I.C.C. and U.S.A., 808 F.2d 22 (7th Cir. 1986).

[18] See Appendix B, Part 1.

WCL's main lines to: (1) Superior/Duluth; (2) Minneapolis/St. Paul; and (3) Milwaukee. Without the trackage rights, WCL cannot reach any of these cities or other carriers serving them. The restrictions essentially preclude WCL from competing with Soo on overhead traffic to, from, and through those points. With the exception of the Ladysmith line that is subject to additional limitations discussed immediately below, the restrictions apply only to overhead traffic that WCL could otherwise only obtain through use of the trackage rights to those interchange points. The restrictions do not apply on any traffic that originates or terminates at any points on WCL's lines. They also do not preclude direct service to consignors or consignees on the trackage rights lines in movements that originate or terminate on WCL's directly owned lines, although local service over the trackage rights lines is precluded. Additionally, the restrictions do not apply to overhead traffic that WCL could interchange with other carriers at other points, particularly the line-haul carriers serving Chicago and Sault Ste. Marie, the Chicago and North Western at various points, and with the Green Bay and Western with its direct connections to Minneapolis/St. Paul. For points in Ontario west of Sudbury, in Upper Michigan or in Wisconsin north of Soo's main line between LaCrosse and Milwaukee, WCL is not restricted as to overhead traffic. The restrictions are designed to preserve Soo's competitive status quo ante on overhead traffic.

The overhead traffic condition applicable to movements through Duluth/Superior is not limited to WCL's use of the Ladysmith-Superior trackage rights but applies to all possible competing movements that WCL might arrange with other carriers serving the Duluth/Superior area. Under the arrangement, Soo may terminate the trackage rights and/or require

WCL to purchase the line. Accordingly, while Soo may force WCL to purchase the line under established price guidelines, neither the trackage rights agreement nor the sale agreement foreclose WCL's participation in this overhead traffic with other carriers. If WCL wants to compete for this traffic, it may do so subject to the possible forced purchase of the Ladysmith line. This restriction is neither financially fatal to WCL nor anticompetitive. It does not constitute good cause to condition or revoke the transaction.

The trackage rights restrictions should have little impact on WCL's financial health, which is predicated on regional service. WCL's pre-consummation studies took these restrictions into consideration and still found that the regional operation could be profitable. Under the terms of the restrictions, no shipper on WCL's lines will be affected. The few shippers outside WCL's service area that might desire routing over WCL's lines will not suffer any substantial adverse effects as a result of this transaction.

The only ascertainable effect on overhead traffic is on that traffic that could be routed through Sault Ste. Marie to or from points in Canada east of Sudbury. For other Canadian points through the Twin Cities or Superior/Duluth gateways, WCL could not provide effective competition to Soo's remaining routes and service. The Soo's remaining main line routes connect Superior/Duluth to Chicago via Minneapolis/St. Paul and Lacrosse, WI. These routes carried most of the pre-sale traffic subject to these restrictions.

We have recently specifically considered these movements through Sault Ste. Marie in Finance Docket No. 30703, Soo Line Railroad Company—Joint Use of Lines—Chesapeake and Ohio Railway Company (not printed), served September 10, 1986. In that proceeding, we authorized a trackage rights ex-

emption for Soo operations over the Chesapeake & Ohio Railroad Company (C&O) between Chicago and Detroit, MI where Soo interlines with CP. Originally, Soo introduced this new route as a relocation of Soo overhead operations pursuant to our class exemption at 49 CFR 1180.4(g).[19] Operations from Chicago to Detroit began on August 7, 1985. Soo demonstrated the need for these operations because of "limitations of the international bridge at Sault Ste. Marie . . . [indicating] that the overall age and operational limitations of this facility prevent the timely and efficient handling of CP traffic interchanged with the Soo at Sault Ste. Marie." Id. at 1.[20]

Soo's change in routing for this traffic generated objections by CNW and Grand Trunk Corporation that "the operational advantages of routing via the Soo's service over the C&O's Detroit-Chicago line, compared to routing via Sault Ste. Marie, are enhanced to an even greater extent . . ." for CP originating and terminating traffic. Id. at 3.

Prior to the Soo operation via Detroit, CP interchanged more traffic destined or originating west of Chicago at Detroit (42,220 carloads in 1984) than through Sault Ste. Marie (27,651 in 1984). Id. at 4. Soo's new rate levels for the Chicago/Detroit gateways are lower than through Sault Ste. Marie. We conclude that "the routing resulting from the Soo/C&O agreement enables Soo to provide a more competitive and efficient service than that under Soo's prior interchange operations with CP via the Sault Ste. Marie gateway. . . ." Id. These

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[19] For reasons not pertinent to this proceeding, that relocation exemption was revoked and application of our class exemption for trackage rights under 49 CFR 1180.2(d)(7) was found applicable.

[20] In this regard, we note that the Sault Ste. Marie bridge is subject to a weight restriction of not more than 178,000 lbs., as compared with the national line-haul average weight restriction of 273,000 lbs. See Railway Line Clearances, International Thomson Press, New York, New York (July 1987).

operational advantages and cost savings result even though the Chicago gateway is more circuitous than the Sault Ste. Marie gateway.[21] The elimination of the interline route to points in Canada east of Sudbury through Sault Ste. Marie will have little, if any, significant effect on shippers. Soo will continue to handle this traffic through the Twin Cities gateway via Chicago. The restrictions do not lessen effective or efficient competitive options for these shippers.

As for the restrictions at Milwaukee, we note that service at Milwaukee will be enhanced for regional movements by the introduction of the new carrier, except for these overhead movements and traffic moving within the Milwaukee trackage rights area. For these movements, Soo will continue to provide service and shippers will not be subjected to a reduction in service or competitive options. By contrast, Soo's rights to provide unit coal train service to Wisconsin Public Service Corporation at Weston, WI over trackage rights between New Lisbon and Weston, WI, is non-exclusive, potentially allowing WCL to provide service. WCL will also benefit from the income that Soo's use of the trackage rights generates. Finally, Soo's trackage rights between Duplainville, WI and Forest Park, IL do not have on their face any anticompetitive impact and the related joint operation of lines between Forest Park and Chicago, IL is pro-competitive.

Overall, the restrictions on WCL merely emphasize the regional orientation of the new carrier. Contrary to the positions advanced by some commentators, and despite its substantial trackage, WCL was designed and planned to serve local economies and provide feeder service. As to regional traffic, WCL's superior competitive service and rates compared to that previously provided by Soo have already been demonstrated.

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[21] The route between St. Paul and Montreal via Sault St. Marie gateway is 1,111.4 miles compared with 1,307 miles through Chicago.

The operating arrangements here do not reduce competition. The most that can be said is that, in some circumstances, they replace one carrier with another. In other places, competition will be increased. While it is understandable that shippers would desire in WCL the greatest degree of competition possible, it is not reasonable to expect that Soo would structure a sale such as this in a way that would jeopardize its long-haul traffic.

5. OMV's requests are denied. OMV has requested that we preclude Soo from selling any of its lines. This request is based on certain alleged third party beneficiary rights. However, as WCL notes, OMV's dispute is with the Soo, not WCL's purchase here. This transaction provided new financial resources to the Soo (the sale price). Soo's ability to pay any judgment OMV may obtain is not adversely affected and may actually be enhanced. Even if we had authority to impose an across the board prohibition on Soo from disposing of any lines (which we question), OMV has not justified such a broad action.

6. Other matters. We have also reviewed this transaction with regard to potentially affected railroad structures on the involved property that are either listed or eligible for listing in the National Register of Historic Places. In order to gather sufficient information to evaluate the eligibility of properties for the National Register, the Commission will undertake a section 106 National Historic Preservation Act review process. Accordingly, WCL shall refrain, pending completion of that process, from taking any action that may jeopardize the historic integrity of sites and structures on the acquired properties that are 50 years old and older.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered.

1. The outstanding petitions are denied, except to the extent further discovery is permitted.

2. The Commission will undertake a section 106 National Historic Preservation Act process in this matter. Pending completion thereof, WCL shall refrain from taking any action that may jeopardize the historic integrity of sites and structures 50 years old and older.

3. This decision is effective on the date served.

CONCUR:

COMMISSIONER SIMMONS, concurring:

After a thorough examination of the issues raised and evidence presented, coupled with the endorsement of shippers, local and State officials, I agree that the transaction should not be revoked. Initially, shippers and governmental agencies believed that without sufficient information available, without an opportunity for Commission analysis, their interests and the national rail policy were not being served. Instead of generalized conjecture and unfounded premises the majority has been so fond of espousing in similar cases, we had before us a more detailed record on the nature of this transaction on which to make an informed decision.

The confusion and concern surrounding the initial filing of this transaction, demonstrates the drawbacks of including within the class exemption large transactions involving potential Class I and II carriers. In order to fulfill our statutory responsibility, I continue to believe that transactions which would create Class I and II railroads should be excluded from the class exemption. Furthermore, I would require that the petitions be subject to notice and comment for a prescribed period of time. This proceeding would encourage the parties to the agreements and other interested parties to cooperate

and share vital information. Use of the class exemption in these large transactions has only inspired greater concern because of a lack of information provided in the notices of exemption to the Commission and the public. Indeed, the scant information contained in the notice requirements has proven to be inadequate to support the necessary findings under section 10505.

Additionally, the sheer scope of these transactions—in terms of mileage, markets, potential revenues, and employee impact—should compel the Commission to carefully consider the viability of these new carriers. This assessment is critical once the large carrier has left the picture because any financial difficulties encountered by the new operators could result in the loss of rail service to substantial shippers and communities. While we should take notice that investors may believe in the new operator's ability to manage from a financial point of view, the Commission's inquiries into the financial health of a new carrier are different. We are concerned with complete loss of service whereas investors have the option of liquidating the property.[1] Those investors' interests are protected. Our obligation is to protect the interests of shippers, communities and employees.

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[1] In its report dated June 28, 1988, the Trustee of Chicago, Missouri & Western Railway, stated on page 5, that CM&W was destined for bankruptcy on the day it was born. He cites two reasons; first, the price was too high and, second, CM&W entered into numerous operating agreements with Illinois Central which decreased traffic on CM&W's lines. He stated on page 6 that the primary reason this happened was that the ICC did not conduct a "full-dressed examination of this purchase and sale transaction." The Trustee went on to state: "Rather, an exemption procedure was used whereby the ICC did not look at the transaction and whether the surviving carrier would be viable. Thus at the time of this sale, no public agency had the opportunity to examine whether the public interest was served by this sale."

As I have expressed in the past, I believe this Commission must examine and reject those agreements which impose conditions and limitations on buyers by the selling railroads that restrict the buyers' ability to realistically compete. Clearly, such provisions are anticompetitive and hamper the buyer's financial viability. Severe operational restrictions contradict the essential purpose of the class exemption and the Staggers Act; that is, to foster financially sound carriers with absolute freedom to compete for shippers.[2]

Upon review, I believe the conditions negotiated in the trackage rights under agreements here are apparently consistent with similar arrangements within the industry, and are not of the egregious nature found in the Montana Rail Line agreement. Provisions contained in the trackage rights agreements are designed to connect WCL to cities and carriers it could not otherwise reach. The provisions in those agreements which preclude WCL from competing with Soo on overhead traffic to, from, and through those points are similar to other conditions found in trackage rights agreements in the industry. Under the agreements, WCL can serve markets that originate or terminate at any point on WCL's lines. It can provide direct service to consignors and consignees on the trackage rights lines in movements that originate or terminate on WCL's directly owned lines. I also note that the restrictions do not apply to overhead traffic that WCL could interchange with other railroads at other points, including carriers serving the important markets of Chicago, Sault Ste. Marie, Minneapolis, St. Paul, and Milwaukee.

While Soo Line retained trackage rights on WCL's line between New Lisbon and Weston, WI, in order to provide ser-

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[2] See my separate expression in Finance Docket No. 31089, Montana Rail Link, Inc., Exemption Acquisition and Operation--Certain Trackage Rights of the Burlington Northern Railroad Company, served May 27, 1988 (not printed).

vice to Wisconsin Public Service Corporation at Weston, the agreement does not contain provisions which preclude WCL from competing to serve the utility.

APPENDIX: APPENDIX A

PART 1

ACTIVE RAIL LINES PURCHASED

Location	Route Miles
Withrow, MN—Forest Park, IL	421.2
Owen, WI—Ladysmith, WI	44.7
Withrow, MN—Sault Ste. Marie, MI	469.6
Chippewa Falls, WI—Eau Claire, WI	11.2
Wisconsin Rapids, WI—Vesper, WI	8.2
Spencer, WI—Ashland, WI	145.8
New Lisbon, WI—Tomahawk, WI	133.1
Argonne, WI—Neenah, WI	121.1
White Pine, MI—Marengo, WI	77.7
Trout Lake, MI—Baraga, MI	192.4
Green Bay, WI—North Milwaukee, WI	103.8
Manitowoc, WI—Neenah, WI	44.2
Cameron, WI—Rice Lake, WI	6.7
Negaunee, MI—Palmer, MI	4.8
Vesper, WI—Nekoosa, WI	16.5

PART 2

LINES APPROVED FOR ABANDONMENT SUBJECT TO SALES AGREEMENT

Location	Route Miles
Dresser-St. Croix Falls, WI—Danbury, WI	50.6
Mellen, WI—Bessemer, WI	33.3
Marshfield, WI—Vesper, WI	16.2
Bergland, MI—Nestoria, MI	68.8
Trout Lake, MI—St. Ignace, MI	27.5
Baraga, MI—Arnheim, MI	10.3

APPENDIX B

PART 1

TRACKAGE RIGHTS AGREEMENTS OVER SOO LINE RAILROAD COMPANY LINES

Agreement No. 1, Twin Cities Trackage Rights:

Location	Route Miles
Withrow, MN—Shoreham, MN	21.3
Central Ave., MN—Crystal, MN	5.4
Cardigan Jct., MN—Soo Line Jct., MN	5.3
St. Paul, MN—Merriam Park, MN	11.1

Agreement No. 2, Ladysmith Trackage Rights:

Location	Route Miles
Ladysmith, WI—Superior, WI	105.1

Agreement No. 3, Milwaukee Trackage Rights:

Location	Route Miles
Duplainville, WI—Milwaukee, WI	16.5
North Milwaukee, WI—Grand Ave., WI	7.0
Cutoff, WI—Meskego Yard, WI	1.9

PART 2

ASSIGNED TRACKAGE RIGHTS AGREEMENTS OVER THIRD PARTY CARRIERS

Agreement No. 1 over Marinette, Tomahawk & Western Railroad Company:

Location	Route Miles
Bradley, WI—Tomahawk, WI	5.4

Agreement No. 2 over Green Bay & Western Railroad Company:

Location	Route Miles
Black Creek, WI—Green Bay, WI	22.3

APPENDIX B

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 31102

WISCONSIN CENTRAL LTD.—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF SOO LINE RAILROAD COMPANY

Decided: October 7, 1987

By decision served September 11, 1987, we stayed the effective date of an exemption that would allow Wisconsin Central Ltd. (WCL) to acquire and operate certain properties (approximately 200 miles) of the Soo Line Railroad Company (Soo). We requested comments concerning the transaction. By decision served September 22, 1987, we denied petitions for reconsideration of the stay so that we would have time to consider the comments. We have reviewed the comments filed and the replies of WCL and Soo and are now vacating the stay. Our study will continue however, and we will issue a further decision addressing the comments.

BACKGROUND

Under our class exemption procedures,[1] exempt status is automatically granted at the end of a 7-day period at which time the transaction could be consummated. Due to the unprecedented scope of this sale, we stayed the transaction until October 25, 1987 in order to receive comments from the public on the appropriateness of considering the sale under our class exemption procedures. Interested parties were given until

[1] The Commission exempted non-carrier acquisition of rail lines from the requirements of 49 U.S.C. 10901 in *Class Exemption for the Acquisition and Operation of Rail lines under 49 U.S.C. 10901*, 1 I.C.C. 810 (1985), *aff'd sub nom. Illinois v. ICC*, 817 F.2d 145 (D.C. Cir., 1987) (*Class Exemption*).

September 25, 1987 to comment and applicant was given until October 2, 1987 to reply.

We received comments in support of lifting the stay and allowing the transaction to proceed from the following parties: The Wisconsin/Upper Michigan Rail Users Committee, *et al* (Rail Users Committee), an ad hoc coalition of shippers, in comments filed September 11, 1987; International Minerals & Chemical Corporation and Michigan-Wisconsin Transportation Company, in comments filed September 24, 1987; Iowa Department of Transportation, Minnesota Department of Transportation, Wisconsin Department of Transportation,[2] Soo, and WCL, in comments filed September 25, 1987. Opposition to the transaction was stated by the Organization of Minority Vendors (OMV), and by the Railway Labor Executives' Association (RLEA), filed September 25, 1987. We also note the late-filed comments of the United Transportation Union, filed September 30, 1987. Also on September 30, 1987, WCL and Soo filed replies.

Additionally, numerous shippers, shipper and business organizations, State, local, and Federal representatives, state and local government agencies, civic organizations, other transportation companies, labor unions, railroad employees, and concerned individuals filed telegrams or letters. Most of this correspondence supports the transaction and the vacating of the stay.

DISCUSSION AND CONCLUSIONS

Our review of the comments filed in this proceeding convinces us that continuation of the stay is not in the public interest. The parties have provided us with considerable additional information since we imposed our stay. Our duty to

[2] WisDOT also filed comments supporting vacating the stay on September 10, 1987.

ascertain and protect the public interest by informing ourselves more fully concerning this transaction has been met. A review of the details of the proposed transaction and the widespread support of the transaction demonstrate good cause to remove the stay and to allow the exemption to take effect.

Continuation of the stay could cause unnecessary harm to the transaction. WCL has argued strongly that a prolonged stay could preclude consummation. WCL states that its pre-consummation financial arrangements did not anticipate a prolonged Commission inquiry because of the availability of the class exemption procedures. WCL states that, if the Commission had stayed this procedure previously, it would have structured its start-up operations differently.

WCL assembled its finances, offices, equipment, staff and work force to institute service at the end of the 7-day notice period. It notes that these expenses are being supported by the proponents of WCL and estimates that $1 million in additional costs have been incurred from September 10, 1987 when the stay went into effect to September 30, 1987. Some individuals are without income during this period. It also notes that its insurance commitments may expire on October 11, 1987, and indicates substantial difficulties should the transaction not be consummated prior to that date.

Concern has also been expressed over diversion of WCL's traffic base during this period. Rail Users Committee, as well as State and local parties have expressed fear that, if financial commitments are undermined and the sale is lost, a series of abandonments may occur and this regional rail system will be permanently lost.

Under these circumstances we will lift the stay, but continue to review the transaction.

RLEA, OMV, the Rail Users Committee, and WisDOT have requested further hearings into the transaction. The concerns expressed in those petitions may be adequately addressed in the context of petitions to revoke the exemption, the usual procedure for resolving issues raised in class exemption proceedings. These parties may pursue this course should they believe it appropriate.[3] Petitions to revoke may incorporate by reference pleadings already filed making procedural requests.[4]

For the reasons stated above, we find that the stay imposed in this proceeding should be vacated. Our action will be made effective three days from the date of service of this decision.

Finally, it should be noted that the use of the exemption process for approval of a transaction of this scope has raised some concern. We continue to believe that the policy underlying the exemption procedure established in Ex Parte No. 392 (Sub-No. 1) for the sales of lines to non-railroads remains valid and on the whole has been extremely beneficial to the shipping public. Nevertheless, it is true that the larger transactions, however one might define them, present issues which are at least somewhat less appropriately dealt with by the exemption process. More interests are more greatly affected, and the efficacy and fairness of revoking the exemption in a later proceeding becomes more questionable. Those difficulties are clearly raised with this transaction.

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[3] This class exemption merely removes processing the application under the formal procedural requirements of 49 U.S.C. 10901 to streamline our procedures. *See Class Exemption, supra* at (9). A class exemption does not divest the Commission of jurisdiction to scrutinize a transaction. *Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 at 899 (1986).

[4] *E.g.*, RLEA's request for oral hearing and petition to commence discovery.

The Commission has recently requested comments in Ex Parte No. 392 (Sub-No. 1) with a view to changing our procedures in a manner which will preserve the benefits of a shortened approval time frame while affording procedural fairness in those instances where real problems arise. The Commission, arguably, would or should make an exception from its regular order in this instance. However, if a change in the procedures is to be made, it should be made as a general matter of policy in Ex Parte No. 392 (Sub-No. 1) rather than on an *ad hoc* basis, especially when there is very little evidence of record addressing the issues of when an alternative procedure ought to be invoked and what that procedure should be. In this particular case, two other factors weigh against deviating from our current procedure. The parties to this transaction obviously relied, and were entitled to rely, on the Commission's stated policy in fashioning the transaction and their approach to obtaining regulatory approval. Secondly, while a proceeding to revoke the exemption in whole or in part may not be the best mechanism to correct any public interest deficiencies in the transaction, the Commission can and will take such action as may be necessary to protect that interest.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The stay is vacated.

2. Notice of this decision will be published in the *Federal Register* on October 14, 1987.

3. This decision is effective three days from the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice

Chairman Lamboley and Commissioner Simmons dissented with a separate expression which will be served at a later date.

Noreta R. McGee
Secretary

(SEAL)